UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

McDONALD'S USA, LLC, A JOINT EMPLOYER, et al.

and **Cases 02-CA-093893, et al.**
04-CA-125567, et al.

FAST FOOD WORKERS COMMITTEE AND SERVICE EMPLOYEES INTERNATIONAL UNION, CTW, CLC, et al.

GENERAL COUNSEL'S REPLY TO CHARGING PARTIES' OPPOSITION TO APPEALS OF THE ADMINISTRATIVE LAW JUDGE'S ORDER DENYING MOTIONS TO APPROVE SETTLEMENT AGREEMENTS

Nearly all the Charging Parties' arguments in their opposition papers[1] have already been addressed and dispensed with in General Counsel's initial brief in support of his appeal of the Administrative Law Judge's order refusing to approve the proposed settlements in this case. Perhaps because the proposed settlements would (1) provide the alleged discriminatees full relief and (2) require the Franchisee Respondents to take the customary remedial steps for the violations of which they are accused, the Charging Parties' opposition papers focus on remote or hypothetical issues and try to create contradictions between the General Counsel's positions and McDonald's USA, LLC where none exist. General Counsel submits this reply brief to address two such arguments by the Charging Parties.

[1] In what follows, "Opposition" denotes Charging Parties' Opposition to Respondent McDonald's USA, LLC's and the General Counsel's Requests for Special Permission to Appeal the Administrative Law Judge's July 17 Order Denying Motions to Approve the Settlement Agreements; "McDonald's Appeal" refers to McDonald's USA, LLC's Special Appeal from the Administrative Law Judge's July 17, 2018 Order Denying Motions to Approve Settlement Agreements; and "GC Appeal" refers to General Counsel's Request for Special Permission to Appeal and Appeal of the Administrative Law Judge's Order Denying Motions to Approve Settlement Agreements.

First, General Counsel answers the Charging Parties' claim that the General Counsel's interpretation of what would happen if a Respondent Franchisee failed to post and/or mail the Notice to Employees required by the proposed settlement is somehow "untenable," "unsubstantiated," and rests on a misquotation. Second, General Counsel rebuts the argument that the language of the Special Notice contains an impermissible non-admissions clause. The remainder of Charging Parties' Opposition attempts to support the ALJ's conclusions without addressing the General Counsel's specific, detailed arguments against them, often simply reasserting the claims made by the ALJ.[2] They are therefore not addressed here.

On the first issue, the Charging Parties argue that the General Counsel's failure to point out to the ALJ and Charging Parties what would happen if a Respondent Franchisee failed to post a required notice is somehow evidence that the General Counsel is engaging in *post hoc* reinterpretation of the settlement language.[3] Indeed, Charging Parties go further and claim that

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[2] E.g., *compare* Opposition at 18 ("General Counsel has presented no justification for prematurely releasing all parties") *with* GC Appeal at 25–27 (step-by-step explanation of practical considerations underlying timing of complaint withdrawal); *compare* Opposition at 17 (relying on ALJ finding that some Franchisee Respondents share ownership to somehow conclude that formal settlements are necessary because there are supposedly repeat offenders) *with* GC Appeal at 8–9 (noting that there have been no findings of violations by <u>any</u> of the Respondents, thus negating the possibility of any repeat offender status, no matter how the Respondent entities are individuated); *compare* Opposition at 18–19 (relying on ALJ conclusion that omission of successors and assigns language is "problematic" without addressing General Counsel's arguments) *with* GC Appeal at 14 (describing alternative remedial processes available and irrelevance of successors and assigns language on facts of these settlements); *compare* Opposition at 24 (asserting that McDonald's customarily communicated with employees through McDonald's Connection system without addressing General Counsel's arguments to the contrary) *with* GC Appeal at 16 (identifying documents communicated to employees regularly by paper, e.g. schedules and discipline, and noting that McDonald's Connection only held training materials).

[3] Opposition at 7–10.

the General Counsel's description of what would happen in this unlikely event is contradicted by the language of the Special Notice.[4] Both assertions are wrong.

On the second point, the Charging Parties attempt to turn the template notice placeholders (for the later insertion of specific language) into the final form of the Special Notice. While correctly noting that the word "enclosed" doesn't appear in the Special Notice templates, Charging Parties ignore the presence of placeholders in the relevant portion of those templates: "A Regional Director of the National Labor Relations Board has investigated an unfair labor practice charge alleging that [insert franchisee name] violated the National Labor Relations Act by [insert action at issue]." [5] Consistent with well-known convention, material in square brackets serves as placeholder for language to be inserted later and the text inside the brackets describes what will replace the placeholder. Thus, "[insert franchisee name]" will be replaced by the name of the Respondent Franchisee which has allegedly breached the settlement and "[insert action at issue]" will, in any particular alleged breach of the settlement, be replaced by the action constituting the breach. Where the failure to post the required notice is the alleged breach that has been found by the relevant Regional Director, language must be inserted there by the Regional Director prior to issuance of the Special Notice to McDonald's USA, LLC for distribution to employees. That language must say the Franchisee failed to post the notice specific to that case. The most informative language for the affected employees—and the most direct, simple, and accurate way to describe what the Franchisee Respondent has failed to do in such a case—is accomplished by saying that the Respondent failed to post the requisite notice

[4] Opposition at 7.
[5] E.g., McDonald's Appeal, Exh. C at Exh. 1.

and providing the notice in question. Any other means of identifying the breach is less clear, less effective, and a less accurate characterization of the Franchisee failure.

Contrary to Charging Parties' assertions, then, the language provided by the General Counsel in his appeal brief is well-supported by the settlement language and in fact the most reasonable interpretation of what would be required of McDonald's USA, LLC in the event a Franchisee Respondent breached the proposed settlement in that narrow, specific manner. Describing the General Counsel's insertion of the specific language which would be required in that situation as a misquotation ignores the fact that the General Counsel clearly indicated he was describing what would happen in a counterfactual situation and used the conditional form to so indicate: "Thus, if a Franchisee were to fail to post the notice required under a settlement, the first sentence of the Special Notice distributed by McDonald's USA would read…"[6] Thus, there was no misquotation. The idea that the General Counsel's interpretation of what the settlements would require is "untenable" or "unsubstantiated" or in contradiction to the language of the settlement fails to come to grips with the settlement language as drafted and ignores the steps which obviously need to be taken in a situation where a Regional Director needs to provide Special Notices to McDonald's USA, LLC.

It is also not surprising General Counsel did not describe this limited, potential operation of the proposed settlement to the Administrative Law Judge or the Charging Parties. As noted

[6] GC Appeal at 11 (emphasis identifying conditional language added).

by McDonald's USA in its reply brief, the likelihood of this potential becoming actual is slight.[7] It would only arise where a Respondent Franchisee decided to accept a default judgment and Board order, which would itself require notice posting by the Respondent Franchisee, to avoid having to post a notice at the time required under the terms of the settlement. There is no indication any of the Respondent Franchisees intend to postpone their posting obligations under the settlements by such means. Further, the Administrative Law Judge and the Charging Parties should have been able to figure out for themselves that the Special Notices would, in case of a determination of breach, need to be modified by a Regional Director prior to issuance to McDonald's USA. The idea that the templates would have been sent without appropriate changes cannot have been seriously entertained by either. Indeed, had either the ALJ or Charging Parties stopped and given the issue a moment's consideration, s/he should have reached a conclusion similar to the General Counsel's. Thus, it is the inference the Charging Parties try to draw—that because General Counsel failed to include a step-by-step explanation of one particular and limited aspect of the settlement agreement in his initial moving papers, his later attempt to dispel confusion on the part of the ALJ and Charging Parties must be a fabrication after the fact—which is untenable and unsubstantiated.

Regarding the purported non-admissions language, the ALJ and Charging Parties both rely on a sentence from *Pottsville Bleaching Co.*, 301 NLRB 1095, 1095–96 (1991), which sentence and case were both identified by the General Counsel in his initial motion for approval

[7] McDonald's USA, LLC's Reply to Charging Parties' Opposition to Requests for Special Permission to Appeal the Administrative Law Judge's July 17, 2018 Order Denying Motions to Approve Settlement Agreements at 4.

of the settlements.[8] The ALJ subtly indicates—by the use of so-called scare quotes—that the language to which she objects may not qualify as a non-admissions clause,[9] but Charging Parties apparently do not notice that and flatly assert that the Special Notices "impermissibly contain a non-admissions clause." Charging Parties are wrong and to the extent the ALJ found that the Special Notice contains a non-admissions clause within the meaning of *Pottsville*, she too erred. In *Pottsville*, the Board explicitly defined "nonadmissions clause" as "any language which suggests that the respondent's conduct may have been lawful."[10] As noted in the General Counsel's initial motion to approve the settlements, the language of the Special Notice "does not disclaim any ULPs or otherwise absolve the ULP-committing entity, the franchisee. Indeed, the Notice opens by attributing blame for the ULP to the franchisee, and ends with McDonald's' condemnation of that ULP."[11] Thus, there is no suggestion that the conduct at issue is lawful and, *a fortiori,* no non-admissions language of the kind prohibited by the holding of *Pottsville*.[12]

The proposed settlements in this case would fully remedy the alleged unfair labor practices even without the participation of McDonald's USA, LLC. The fact that the proposed settlements provide (1) methods for McDonald's USA to effectuate certain remedies in case of

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[8] GC Appeal, Exh. B at n.22.

[9] GC Appeal, Exh. A (Order Denying Motions to Approve Settlement Agreements) at 31.

[10] 301 NLRB at 1095, n.7.

[11] GC Appeal, Exh. B at n.22.

[12] Charging Parties mischaracterize the Special Notices as containing non-admissions clauses applicable to the franchisees: "General Counsel indefensibly agreed to include broad non-admissions language (covering both McDonald's and its franchisee) not only in the 'Scope of Agreement' section of each of the 30 proposed settlements, but within the short-form 'Special Notice to Employees'." Opposition at 20 (emphasis added). Yet review of the Special Notice template, which is attached to the Order Denying the Motions to Approve the Settlements as well as to the settlements themselves, demonstrates that there is no language therein suggesting that the franchisee's conduct was lawful. This may explain why Charging Parties fail to cite any specific language which they contend constitutes a non-admission clause.

Franchisee breach and (2) leverage to encourage McDonald's to persuade franchisees to remedy alleged breaches (by virtue of the potential for a default proceeding—including joint employer findings—against McDonald's USA) is just the metaphorical icing on the cake. The attempts by the ALJ and the Charging Parties to elevate that additional finding to the status of *sine qua non* for settlement should be rejected.

Dated: August 29, 2018

/s/ Jamie Rucker
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CERTIFICATE OF SERVICE

The undersigned, an attorney for the General Counsel, hereby certifies that he caused a true and correct copy of General Counsel's Reply to Charging Parties' Opposition to Appeals of the Administrative Law Judge's Order Denying Motions to Approve Settlement Agreements to be electronically filed with the National Labor Relations Board on August 29, 2018 and served on the same date via electronic mail at the following addresses:

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